

ABC' s of Immigration Law: Employment Based Immigrant Visas

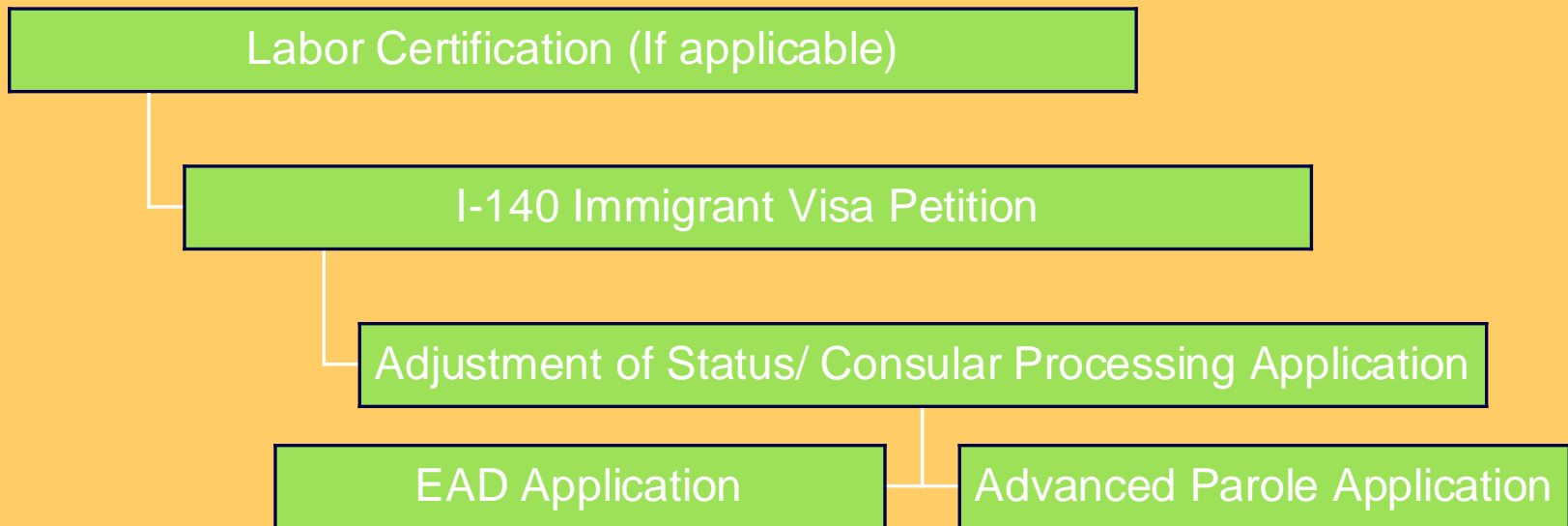
Karin Wolman (d.I.), New York, NY

Matthew Hirsch, Wayne, PA

Charina Garcia, San Francisco, CA



Permanent Residency Flowchart



EB Preferences - INA § 203(b)

- **EB-1: Priority Worker**
 - alien of extraordinary ability*
 - outstanding researcher or professor
 - multinational manager
- **EB-2: Advanced Degree/Exceptional Ability**
 - national interest waiver*
 - Labor Cert. with Advanced Degree, or BA + 5
 - Schedule A, Group II
- **EB-3: Professional/Skilled Worker/Other**
 - Labor Certification (“L/C”)
 - Schedule A, Group I



EB Preferences - INA § 203(b)

- EB-4: Special Immigrants

- Religious Workers
- Abused spouses/VAWA
- Juveniles
- Others

EB-5: Immigrant Investors

- “job creation”
- \$1.0 million investment
- \$500K for Target Employment Area/Regional Center



Employment-Based First Preference EB-1

- Aliens of Extraordinary Ability
INA § 203(b)(1)(A), 8 CFR § 204.5(h) – may self-sponsor
- Outstanding Researchers & Professors
INA § 203(b)(1)(B), 8 CFR § 204.5(i)
- Multinational Managers & Executives
INA § 203(b)(1)(C), 8 CFR § 204.5(j)

All priority workers exempt from L/C



Extraordinary Ability EB-1(1)

Must meet at least 3 out of 10 requirements:

1. Lesser national or international prizes or awards
2. Membership in associations that demand outstanding achievement
3. Published material about the alien in the media
4. Judge of the work of others in the field of endeavor
5. Original contributions of major significance to the field
6. Authorship of scholarly articles in the field
7. Display of work at artistic exhibitions
8. Leading/critical role for organizations that have a distinguished reputation in the field
9. High remuneration compared to others in the field
10. Commercial success in the performing arts



Outstanding Professors & Researchers EB-1 (2)

- Internationally recognized as outstanding in a area of teaching/research
- Reqs. 3 years F/T experience in teaching/ research in that academic area
 - experience while completing degree d/n count unless work was outstanding (i.e., published), & degree was earned
- Offer of permanent employment
 - tenure-track university teaching appointment, or
 - permanent job offer (“expectation of continuing employment”) from university/employer with F/T arch staff of 3+



What is Outstanding?

Must meet at least 2 out of 6 requirements:

1. Major award for outstanding achievement in the field
2. Membership in associations that demand outstanding achievement in the field
3. Featured in professional articles written by others
4. Judge of the work of others in the field
5. Original scientific or scholarly research in the field
6. Authorship of scholarly books or articles



Multinational Manager EB-1(3)

- Foreign company & U.S. petitioner must have “qualifying relationship” i.e parent-subsidiary, affiliate or branch
- Must both be “doing business” for over 1 year
 - operational, financially stable
- Qualifying year of experience abroad must have been in a managerial/executive position
 - w/in 3 years preceding IV petition or entry as nonimmigrant
- U.S. job must be managerial/ executive



EB-2 National Interest Waiver

- Waives labor certification & job offer requirements
- INA § 203(b)(2)(B), 8 CFR § 204.5(k)(4)(ii)
- Who Qualifies?
 - Advanced degree professionals
 - Aliens of Exceptional Ability
 - M.D.'s in shortage area/VA facility:INA § 203(b)(2)(B)(ii)
- Matter of NYS Dept of Transportation
 - Work has substantial intrinsic merit
 - Prospective benefit is national in scope
 - Labor certification would be contrary to national interest



EB-2 – Exceptional Ability

Who has Exceptional Ability?

Anyone who meets at least 3 of 6 requirements:

1. Academic record/degree
2. 10 years experience in field
3. Professional license or certification
4. High salary
5. Membership in professional societies
6. Recognition for achievements



EB-2 Schedule A, Group II

- Requires job offer, but no labor certification
- INA § 203(b)(2)(A), 20 CFR § 656.15
- Who Qualifies?
 - Aliens of Exceptional Ability in arts and sciences
in any field in which colleges commonly offer a degree,
but alien need not have completed the degree
Different Exceptional Ability standard than 8 CFR 204.5(k)!
 - at least 1 year experience in the field
 - job offer is F/T, offers prevailing wage
 - requires posting notice & 30-day quiet period



Schedule A, Group II, cont' d

- What is the labor standard for Exceptional Ability in the arts & sciences under 20 CFR § 656.15?



Must meet 2 out of 7 requirements:

1. internationally recognized prizes or awards
2. memberships in international associations which require outstanding achievement of their members
3. publications about the alien's work in the field
4. judge of the work of others in the field
5. original major scientific or scholarly contributions to the field
6. authorship of publications in professional journals
7. display at artistic exhibitions in more than 1 country



EB-2 Advanced Degree Professional

- INA § 203(b)(2), 8 CFR § 204.5(k)(2)
- Labor certification required
- Job Requires, & Alien has, an Advanced Degree:
 - U.S. academic or professional degree above a Bachelor's, or foreign academic equivalent, or
 - Master's equivalent = Bachelor's degree + 5 years post-baccalaureate progressive experience in field



EB-2: Advanced Degree Professionals

- If relying on Bachelor's degree + 5 years progressive experience:
 - Cannot satisfy Bachelor's degree requirement with foreign equivalent based upon education + experience, nor with combined education from more than one school: Must have U.S. Bachelor's degree, or foreign single-source degree evaluated as equivalent to a Bachelor's degree
 - Must document that all 5 years of progressive work experience occurred after degree was earned



EB-3 Professionals, Skilled Workers, and Other Workers

- INA § 203(b)(3); 8 CFR § 204.5(L)
- Labor certification always required
 - except for Schedule A, Group I: RNs - 20 CFR § 656.15
- 40,000 visa numbers plus any unused visas from EB-1 or EB-2



EB-3 Skilled Workers

- INA § 203(b)(3); 8 CFR § 204.5(l)(3)
- Skilled workers
 - Job must require at least 2 years of training and/or experience
 - Applicant must possess at least 2 years education, training or experience



EB-3 Professional

- INA § 203(b)(3); 8 CFR § 204.5(l)(2)
- Professional: Must hold a US baccalaureate degree or foreign educational equivalent
- Cannot substitute experience for a degree
- Must be a member of the professions - minimum of a baccalaureate degree is required for entry into the profession



EB-3 Unskilled Other Worker

- INA § 203(b)(3); 8 CFR § 204(5)(I)(3)
- Labor Certification always required
- “Other workers”
 - Job requires less than 2 years of training, education and/or experience
 - Applicant possesses required background
 - Limited to 10,000 of EB-3 visa allocation



Labor Certification – INA Sec. 212(a)(5)

- Required for most EB-2/EB-3 filings
- Intended to protect U.S. workers
- Requires proof of employer's efforts to recruit qualified and available U.S. workers
- PERM system launched in March 2005
- Automated, web-based system to replace resource-intensive, multi-layered process
- After completing recruitment/postings, Application is filed on-line



Labor Certification

- Refers to particular position, with particular employer at particular worksite
- Includes job title and job duties
- Includes wage offered
- Includes minimum requirements
 - Educational requirements
 - Experience requirements
 - Technical requirements
 - Other special requirements



Prevailing Wage Issues

Under PERM, SWA's role significant reduced

- SWA's issue prevailing wage determinations
- PWD = weighted avg. of similarly employed workers in area of intended employment
- SWA's determine PWD using characteristics of job offered
- Usually from DOL's On-line Wage Library
- Can be from alternate authoritative wage source



Recruitment under PERM

- Employer must make an adequate test of the labor market
- Employer must advertise position in newspaper of general circulation serving the area of intended employment
- Employer must post position with state unemployment office
- Employer must post notice of filing internally with endorsements required by regulations
- Employer must conduct supplemental recruitment for professional positions



DOL Requirements

- Requirements may not exceed “actual minimum requirements” per O*Net
- Requirements may not be “unduly restrictive”
- Employer’s requirements must arise from “business necessity” i.e. bear “reasonable relationship” to occupation and “essential” to performance of job duties.
- Recruitment must be conducted in good faith and that qualified U.S. workers were contacted and rejected only for bona fide reasons;



Immigrant Visa Petition: I-140

8 C.F.R. § 204.5

- Must prove petitioner can pay offered salary
- Must prove beneficiary's qualifications for position
- Filed with Texas or Nebraska Service Center
- Standard processing time 10 – 12 months
- Premium processing for \$1,000 filing fee in limited circumstances where maxing out in H-1B status
- Once approved, may need to wait for visa availability



Ability to Pay Offered Wage

- 8 C.F.R. § 204.5(g)(2)
- Prove company can pay the offered wage from priority date through grant of permanent residence
- If employs over 100 employees, provide a statement from financial officer
- Primary Evidence(required):
Annual report, tax return, or audited financial statements
- Secondary Evidence (supplemental):
Profit/loss statements, bank account records, personnel records, totality of the circumstances



Ability to Pay Offered Wage: Positive Determination

- Yates Memo (AILA InfoNet Doc. No. 04051262)
- Net income equal to or greater than the proffered wage
- Net current assets equal to or greater than the proffered wage
- Credible, verifiable evidence that petitioner is not only employing beneficiary, but also has paid or currently is paying the proffered wage



Employee Meets Minimum Requirements

- 8 C.F.R. § 204.5
- Beneficiary must have all education, training and experience specified in the job offer at the time labor certification filed
- Must provide an official academic record
- If foreign degree, must have degree evaluated to determine if equivalent to a U.S. degree



Degree Equivalencies

- EB-2: Foreign degree equivalent has been defined as one foreign degree and not a combination of degrees.
8 C.F.R. § 204.5(k)(2)
- EB-3 Professional: Bachelors requirement - 3 year degree must be equivalent to a U.S. degree, or a combination of degrees can meet definition of bachelors degree or foreign degree equivalent.
8 C.F.R. § 204.5(l)(1)



Work Experience

- EB-2, BA/BS plus 5: Work experience must be progressively responsible post-baccalaureate work experience.
- Progressive experience: Employment experience that reveals, progress, moves forward, and advances towards increasingly complex or responsible duties. (AILA doc: 00032703)
- Provide letters, affidavits confirming prior work experience signed by prior employers or co-workers



Adjustment of Status v. Consular Processing

Adjustment of Status

- Application filed w/ and adjudicated by CIS
- Eligible per INA Sec. 245(a)
- Subject to bars under Sec. 245(k) and 245(c)
- Eligible for interim benefits i.e. EAD and advance parole
- Eligible for “job flexibility” per Sec. 240(j)
- Applicant for AOS can remain in U.S. pending approval

Consular Processing

- Application filed w/ and adjudicated by DOS
- Subject to non-reviewable discretion of consular officer
- Appropriate for persons living abroad or who are barred from AOS
- Not eligible for EAD or “job flexibility”
- Protracted processing for AOS has made consular processing an option



Immigrant Visa Quotas/Limits

- Annual limit of 140,000 per INA § 201(d)
- EB-1, EB-2, EB-3 limited to 28.6% each
 - 40,040 visas per preference category
- Per country limit of 7%
 - No more than 2802 per country, per category
- Chargeability- INA § 202(b)
 - Country of Birth, *not* Citizenship
 - Cross-chargeable to spouse's COB



Priority Dates/Cut-off Dates

- EB Beneficiaries can file for AOS/IV processing only when Priority Date has been reached or is current
- What is a Priority Date?
 - date L/C was filed
 - if no L/C, date Immigrant Petition (I-140) was filed
- When is an EB visa available?
 - when preference category in Visa Bulletin is “Current,” or
 - when cut-off date in Visa Bulletin for preference category & country of chargeability is on or before Priority Date



Quota Backlogs

- Each month Dept. of State determines how many immigrant visas were used worldwide and publishes a “cut-off date” in the Visa Bulletin.
- Backlogs occur when the number of immigrant visas filed exceeds the number of immigrant visas available
- Quota backlog system allows individuals to continue filing for immigrant visas and preserves place in line
- Cannot obtain permanent residence until visa is available, i.e. priority date is current



Visa Retrogression

What is Retrogression?

- Previously current dates on the Visa Bulletin may go backwards, or categories may become “Unavailable”

Why does it matter?

- Priority date must be current on the date I-485 or immigrant visa application is filed, AND again when the case is adjudicated



Visa Bulletin - February 2009

Emp Based	All chargeability areas (except those listed)	China	India	Mexico	Philippines
1 st	Current	Current	Current	Current	Current
2 nd	Current	01Jan05	01Jan04	Current	Current
3 rd	01May05	01Oct02	15Oct01	01Apr03	01May05



Case Strategy

- Cross-chargeability: If spouse born in a country not backlogged, can charge against that country's visa quota (i.e. Indian beneficiary/Swedish spouse)
- An EB 1st, 2nd or 3rd preference is entitled to earliest priority date and are transferable. If I-140 approved, can transfer that priority date to a future EB petition.
- Moving from EB-3 to EB-2: Experience gained at petitioning employer through distinctly different positions



Questions & Answers



2009 AILA Teleconference/Web Conference

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Related AILA Publications

- *Kurzban's Immigration Law Sourcebook*
- *The David Stanton Manual on Labor Certification*
- *Immigration & Nationality Law Handbook*, editions 2006-2007, 2007-2008, 2008-2009
- *AILA's Focus on EB-2 and EB-3 Degree Equivalency* by Ron Wada

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